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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1312

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT

NATIONAL BUS TRAFFIC ASSOCIATION, INC.
GREYHOUND LINES, INC.
TRANSCONTINENTAL BUS SYSTEM, INC.
AMERICAN BUSLINES, INC.

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JURISDICTIONAL STATEMENT

Appellants, National Bus Traffic Association, Inc.; Greyhound Lines, Inc.; Transcontinental Bus System, Inc.; and American Buslines, Inc., appeal from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered on December 11, 1967, dismissing the complaint against

a report and order of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is not yet reported in the Federal Supplement, but copies of the opinion and order as released by the Court are attached hereto as Appendix A. A copy of the decision and order of the Interstate Commerce Commission, by its Operating Rights Review Board No. 3, in Docket No. MC-125115 (Sub No. 2), *Louis Rosenbaum Common Carrier Application,* dated April 28, 1966, and served May 9, 1966, is attached hereto as Appendix B. A copy of the report and recommended order of the Hearing Examiner in that proceeding, served January 6, 1966, is attached hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. §§1336, 1398, 2284, and 2321-2325 to enjoin and set aside the decision and order of the Interstate Commerce Commission. (Appendix B) The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on December 11, 1967, and notice of appeal was filed in that court February 9, 1968. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *United States v. Drum,* 368 U.S. 370 (1962); *American*

Trucking Associations, Inc. v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The relevant statutory provisions are the National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001; and section 207 of the Interstate Commerce Act, 49 U.S.C. §307. They are set forth verbatim in Appendix F, attached hereto.

QUESTIONS PRESENTED

1. Whether the Court erred in sustaining the Commission's grant of new, regular route, point-to-point operating authority as a motor common carrier of passengers on the principal ground that the use of Spanish-speaking drivers so distinguishes the proposed service from admittedly adequate existing service as to support the finding that it is required by public convenience and necessity?

2. Whether the Court erred in approving the Commission's grant of a certificate under section 207 of the Interstate Commerce Act predicated, in part, upon a theory that the action might help curb unlawful transportation activities by unknown persons not party to the proceeding?

3. Whether the Court erred in approving the Commission's grant of authority to transport passengers between El Paso, Texas, and Los Angeles, California, in the complete absence of evidence of passengers originating at Los Angeles, California, for either one-way or round-trip movement?

4. Whether the Court erred in approving the Commission's decision in the light of the Congressional

intention declared in the National Transportation Policy "to provide for fair and impartial regulation" and its requirement that the Act be administered "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers"!

STATEMENT OF CASE

By application filed January 5, 1965, Louis Rosenbaum, doing business as El Paso-Los Angeles Limousine Express of El Paso, Texas, sought from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing transportation in interstate and foreign commerce as a common carrier by motor vehicle of passengers and their baggage in limousine service between El Paso, Texas, and Los Angeles, California, over a specified regular route. A hearing was held on the application, and the Hearing Examiner recommended that the application be granted. (Appendix C) On exceptions to that report and recommended order, the Commission, Operating Rights Review Board No. 3, entered the decision and order assailed (Appendix B) in which it adopted the findings and conclusions set forth in the Examiner's report, with a minor modification. Petitions for reconsideration and for a finding that the proceeding involved an issue of general transportation importance, thus warranting consideration by the entire Commission, were denied by orders dated September 6, 1966 (Appendix D) and December 14, 1966 (Appendix E), respectively. Pursuant to section 17 of the Interstate Commerce Act, 49 U.S.C. § 17, and Rule 101 of the Commission's General Rules of Practice, 49 C.F.R. § 1100.101, the assailed decision was, therefore, administratively final.

Appellants, who were protestants before the Commission, filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division in Civil Action 67-C-265 to annul and set aside the Commission's decision and order. On December 11, 1967, the District Court affirmed the decision and order and dismissed the complaint. (Appendix A)

THE QUESTIONS ARE SUBSTANTIAL

1. The issue raised by this appeal is whether the Commission may grant a certificate of public convenience and necessity for a new motor-carrier passenger service, after expressly finding existing service to be adequate, because of certain "extras" proposed by the applicant and because the proposed service might help curb unlawful passenger transportation. Appellants submit that the reasons given for granting the new certificate by the Commission and approved by the District Court do not measure up to the "public convenience and necessity" standard established in the statute, nor comport with the National Transportation Policy.

2. In the first year of its regulation of motor carriage, the Commission interpreted the "public convenience and necessity" standard in section 207 of the Interstate Commerce Act, 49 U.S.C. § 307:

> "The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." [1]

[1] *Pan American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936).

This landmark interpretation of public convenience and necessity as a public demand or need for service not being adequately met by existing carriers, has been consistently followed by the Commission and has received judicial approval. In *Hudson Transit Lines* v. *United States*,[2] the District Court said:

> "The Commission has frequently held that under §207 of the Act, 49 U.S.C.A. §307, there must be an affirmative showing not only that a common carrier service is required in the convenience of the public but also that it is a necessity, and that the latter element includes a showing that present facilities are inadequate. The courts, too, have recognized inadequacy of existing facilities as a basic ingredient in the determination of public 'necessity'."

Subsequent to its report herein, the Commission, in an unprinted decision,[3] reaffirmed its long-recognized policy that the inadequacy of the existing service is one of the ingredients basic to the determination of public convenience and necessity:

> "The Commission has repeatedly indicated that in the absence of exceptional circumstances, existing carriers are entitled to all the traffic they can handle adequately, efficiently, and economically within the limits of their authorities before a new, competing service is authorized."

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[2] 82 F. Supp. 153, 157 (S.D.N.Y., 1948) (citations omitted), aff'd *per curiam* 338 U.S. 802.

[3] Docket No. MC-128601, *Glynn S. Boles Common Carrier Application*, decided April 27, 1967. Inasmuch as the *Boles* decision is not printed in the bound volumes of the Commission decisions, it is reproduced, in full, in Appendix G.

After summarizing the evidence showing the adequacy of the existing service, the Commission in the *Boles* case concluded:

> "In the circumstances, we cannot conclude that there is any justification for departing from the general rule that existing carriers should be allowed to handle the available traffic without added competition if they are able to provide adequate service."[4]

3. The instant decision represents a radical departure from the otherwise consistently-followed policy that a proposed new service must be responsive to a reasonable public demand which is not being adequately met by the existing carriers. To distinguish the proposed service, the Commission placed particular emphasis upon applicant's proposed use of Spanish-speaking drivers and concluded that "there is a definite need for a more considerate service." (Appendix C, p. 9) The use of bi-lingual drivers and the other factors considered as distinguishing the proposed service[5] are not the sort of transportation characteristics which have in the past been considered as establishing a reasonable public demand for a new and different service.

In *D. C. Transit System, Extension—Limousine Service,*[6] the Commission declined to approve a new passenger service in which applicant proposed to use specially-built limousines, equipped with special air-

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[4] *Id.*

[5] "But beyond that [use of Spanish-speaking drivers], the service proposed is in fact distinctive. It will assure the witnesses and those they are representative of that their baggage will arrive with them; it will afford them more comfort than a bus, it will afford faster service." (Appendix C, p. 9)

[6] 81 M.C.C. 737 (1959).

line-type reclining seats, magazine stands, desk-type tables, air conditioning, telephone service, dictating machines, and rear baggage storage space. Relying on the *D. C. Transit* decision, the Commission denied an earlier application of the applicant herein. (Appendix C, pp. 3, 8) [7] Both the *D. C. Transit* decision and the denial of Rosenbaum's prior application were based on the conclusion that the "extras" proposed, although possibly attractive to a limited number of persons, were not so distinctive as to constitute a new and needed service. In the assailed decision, however, the Commission did not discuss this basic issue, but sought to distinguish the instant case on evidentiary grounds.[8] Likewise, the District Court treated this suit as one which turns primarily upon the question of the substantiality of the evidence, rather than upon the correctness of the standard to be applied.[9]

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[7] In the prior report, as quoted in Appendix C, the Board concluded:

> "Although the features which applicant would offer might be attractive to a limited portion of the travelling public, we are not persuaded that they are so distinctive as to transform what is essentially a regular-route, point-to-point service into a new and specialized type of motor carrier operation for which there is a public demand."

[8] After quoting the conclusion in the preceding footnote, the Commission said:

> "The quoted sentence is, except for the final phrase, a direct quote from the *D.C. Transit* case cited. The finding is, therefore, that the two cases are identical. Whatever the evidence was in the prior application, the evidence in the present case does not warrant the conclusions in the *D.C. Transit* case. . . ." (Appendix C, p. 8)

[9] Even on evidentiary grounds the Commission decision is deficient because it granted authority *between* El Paso and Los Angeles. All of the evidence relates only to service originating at El Paso and there is not one shred of evidence respecting a need for service originating at Los Angeles.

4. A reversal of agency policy calls for thorough analysis and explication.[10] In *City of Lawrence* v. *Civil Aeronautics Board*,[11] the First Circuit Court of Appeals stated that agency reversal, without explanation, of prior decisions, or departure from the reasoning and holding in similar proceedings, is arbitrary and capricious and must be reversed. Here the Commission has departed from its established standard that a proposed new service must be responsive to a reasonable public demand or need not being adequately served by the existing carriers. Although recognizing that protestant-appellants "no doubt provide adequate bus service" (Appendix C, p. 9), the Commission has approved a new, competitive service primarily because of the proposal to use Spanish-speaking drivers. Admittedly there is no need for bi-lingual drivers as the protestants announce arrivals and departures in Spanish. (Appendix C, p. 9) The approval herein was manifestly based on the preference of the witnesses for Spanish-speaking drivers. However, public support based upon language, nationality, or racial preference is not justification for approval of a new service.[12]

5. The Commission's secondary ground for approval is the completely unsupported statement that the "success of applicant's operation may tend to reduce the amount of unlawful operations." (Appendix C, p. 9) This is clearly not a conclusion based on the record

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[10] *ABC Air Freight* v. *Civil Aeronautics Board*, —— F. 2d —— (2d Cir. 1968). Docket No. 31795, decided March 13, 1968).

[11] 343 F. 2d 583, 588 (1965). See also *Transcontinental Bus System, Inc.* v. *Civil Aeronautics Board*, 383 F. 2d 466, 491 (adv. sheets) (5th Cir. 1967).

[12] See *Boles*, Appendix G.

herein, but a hoped-for side effect of the grant. But even if the record justified an affirmative finding that the proposed service would tend to reduce existing illegal operations, it would not meet the public convenience and necessity standard in the statute. The proper method of combatting illegal operations is better enforcement, not the approval of additional, competitive operations where the existing service is adequate.

6. In the National Transportation Policy, Congress has declared that the Interstate Commerce Act is to be administered and enforced in a manner, among others, to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation. This Court said in *Schaffer Transportation Co.* v. *United States*,[13] that the Policy is the "yardstick by which the Commission's actions will be measured." The instant decision fails to measure up to that standard. The appellant carriers are those ordinary regular-route carriers upon which "the public must depend for its day-to-day basic transportation."[14] The regulatory scheme of the Interstate Commerce Act places upon them the obligation to provide a reasonably continuous and adequate service designed to meet the need of that public and, in exchange, is intended to protect them from new, unnecessary competition. The public interest in a sound national transportation system is not served by confronting existing carriers with new competitive service based on trivial added features designed to meet the preference of a

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[13] 355 U.S. 83, 87-88 (1957).

[14] *Asbury Park—N. Y. Transit Corp.* v. *Bingler Vacation Tours*, 62 M.C.C. 731, 746 (1959).

limited number of persons. The Commission itself has long so-recognized:

> "The best interests of the public as a whole are not served by the establishment of duplicating facilities which, although providing a small measure of additional convenience to some, endanger the efficiency of existing facilities to the detriment of the majority." [15]

The approval herein is based upon factors directed toward providing such a "small measure of additional convenience to some" rather than upon any fundamental inadequacy in the existing service. Unless reversed, it stands as a precedent for other grants of authority based on factors of slight added convenience and the weakening of the well-considered and long-established interpretation of "public convenience and necessity" heretofore applied in cases of applications for new authority.

CONCLUSION

The questions presented by this appeal are substantial and are of public importance. For the reasons stated, appellants urge that jurisdiction be noted and that the judgment of the District Court be reversed

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[15] *E. Vanderhoof & Sons, Extension—West Orange*, 52 M.C.C. 755, 771 (1951); *Greenville Bus Co., Common Carrier Application*, 79 M.C.C. 387, 394 (1959).

and the case remanded to that Court for disposition consistent with the Court's opinion.

Respectfully submitted,

NATIONAL BUS TRAFFIC ASSOCIATION, INC.
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